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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOUELLA F. BENSON,

Petitioner,

v.

RICHARD A. SCHWARTZ, M.D.
ANDREW B. MOLCHON, M.D.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR THE STATE OF VIRGINIA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether or not the Petitioner's constitutional right to a fair trial and due process was violated by admitting the opinion of the Medical Malpractice Review Panel's opinion.

II. If the jury was entitled to hear the opinion of the Medical Malpractice Review Panel, whether or not the Petitioner was denied a fair trial and due process by the Trial Court's refusal to permit the Petitioner to directly confront the Panel and its findings and to refuse to admit the submittals to the Panel.

III. Whether or not the trial and the totality of the circumstances was such as to deprive the Petitioner of a fair trial and due process.

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TO: The Honorable Chief Justice of the United States and The Honorable Associate Justices of the Supreme Court of the United States.

The petitioner respectfully prays that a writ of certiorari issue to review the final order of the Virginia Supreme Court of Appeals entered on December 17, 1982, that affirmed the judgment entered against the petitioner in the Circuit Court for the City of Alexandria, Virginia.
L-6446 and L-6447.

OPINIONS BELOW

There was no opinion in the Circuit Court of the City of Alexandria but an adverse jury verdict and there was no opinion as such by the Virginia Supreme Court, City of Alexandria, other than a simple denial of the appeal which is found in the Appendix.

JURISDICTION

The Jurisdiction of this Court is invoked under section 1254(1) of Title 28 of the United States Code.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Fourteenth Amendment To The United States Constitution, Section I:

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 8.01-581.8 of the Virginia Code as Amended:

> ADMISSIBILITY OF OPINION AS EVIDENCE: APPEARANCE OF PANEL MEMBERS AS WITNESSES: IMMUNITY FROM CIVIL LIABILITY. — An opinion of the medical review panel shall be admissible as evidence in any action subsequently brought by the claimant in a court of law but such opinion shall not be conclusive and either party shall have the right to call, at his cost, any member of the panel as a witness. If called, each witness shall be required to appear and testify. The panelists shall have absolute immunity from civil liability for all communications, findings, opinions and

conclusions made in the course and scope of duties prescribed by this chapter. (Code 1950, § 8-918; 1976, c. 611; 1977, c. 617.)

STATEMENT OF THE CASE

I. PROCEEDINGS

Pursuant to the amended Code of Virginia, Title 8.01, Section 581.1 et seg. a Medical Malpractice Review Panel was convened to review the allegations of the Petitioner. In brief, the complaint was one of negligence founded on a mis-diagnosis of Petitioner as a paranoid-schizophrenic and not concentrating enough on the physical problems the EKG and symptoms demonstrated while a patient in the Cardiac Care Unit in August of 1977, at the Alexandria Hospital when she was seen late at night in the Cardiac Care Unit by a committing psychiatrist who noted that she was not committable at that point.

Suit was filed by the Petitioner in the Circuit Court for the City of Alexandria on December 19, 1980. Dr. Schwartz filed a demurrer which he subsequently removed. Various pre-trial motions and discovery practice ensued. More particularly the Petitioner filed an Amended Motion for Judgment pro se for Injunction relief restraining and enjoining from maintaining and communicating the erroneous diagnosis to anyone after lengthy evaluations by other psychiatrists and extensive psychological testing proved that she was not a paranoid schizophrenia, had no psychosis or formal psychiatric diagnosis other than the one made in the Cardiac Care Unit. The scientific psychological testing revealed that she could not have been a paranoid schizophrenia in 1977.

The cases were to be tried together closely commencing on November 4, 1981 and ended on November 9, 1981, with a jury verdict in favor of Defendant Dr. Molchon and the Petitioner was ordered to pay his court costs. Prior to verdict the trial judge had dismissed defendant Dr. Schwartz before a pertinent witness was heard. The Judge's final order shows dismissed with

prejudice against the Petitioner in the Case of Dr. Schwartz, the primary care doctor. After Dr. Schwartz was dismissed the jury returned deadlocked. One juror was undecided and another did not feel at all that the standard had been met. After being given the "Allen" charge (inspite of the rejection and exception of counsel for the Petitioner) the jury agreed upon the verdict for Dr. Molchon late on the night of November 9, 1981. Counsel for Dr. Schwartz signed an order allowing all pre-trial hearings to be a part of record. Dr. Schwartz also was government affiliated.

Notice of Appeal and Appeal were timely filed before the Virginia Supreme Court by the Petitioner pro se. Counsels for the defendant did not respond during the designated time limit nor did they ask for or have the transcript to respond. On December 17, 1982, the Virginia Supreme Court of Appeals entered an order refusing to hear Petitioner's appeal. There is no absolute right of appeal in civil actions of this type in Virginia.

II. FACTUAL BACKGROUND

The Petitioner was admitted to Alexandria Hospital, Alexandria, Virginia, on the morning of August 14, 1977. She complained of shortness of breath and severe chest pains. A Dr. Hooper who was on duty took an EKG and after comparing it with the one taken in that hospital three months earlier, wrote junctional rhythm and shifting pacemaker – not present 5/12/77 and told the Petitioner she would have to go to Cardiac Care. Dr. Hooper's diagnoses on the chart show a (1) Prob. I.M.I. overt., (2) R/O intest. pro., and (3) lg. narrow pre. R/O IHSS (Vol. I) (which is another heart condition). The hospital called a Dr. M. A. Quershi who wrote on the chart that the patient had a nodal rhythm and testified that he told her he was a medical officer of the U.S. Government from St. Elizabeth's. The patient had never been told to see a psychiatrist, she was afraid of dying and informed that she did not want a government affiliated physician that she was a private person and felt

she was in a private hospital and had been told previously of physical reasons for her chest pain. Dr. Quershi testified that he is a cardiologist who works with mental patients. (Vol. I-letter from Alexandria Hospital)

Dr. Richard A. Schwartz, a cardiologist was brought into the picture to replace Dr. Querchi and sent Dr. Andrew Molchon, a committing drug expert psychiatrist to see the Petitioner late at night in the Cardiac Care Unit. (Dr. Molchon testified that he particularly wanted to evaluate her under those stressful conditions.) Although Dr. Schwartz had asked the petitioner if she would mind talking to his friend and drug expert psychiatrist, she had no idea that she would be seen in the Cardiac Care Unit or in the hospital. (She informed Dr. Schwartz that she had been told her problem was physical, gave him a history but said she was not adverse to speaking to anyone who was honest and specified certain points if she did talk to a psychiatrist. Although neither Drs. Hooper or Quershi had written anything mental or such recommendations on the chart, a Nurse Clark in admitting recommended a psychiatric consult before Dr. Schwartz came into the picture after the Petitioner had been given medication, ignoring her history.

The Petitioner had been a patient in Emergency in that hospital three months earlier when she became ill from verified chemical odors in the LaSalle Building where they leased offices. (See Robert Paris' testimony TR 648-59 Vol. II.) The diagnosis on May 12, 1977, was dehydration and gastroenteritis with fever, chest pain. At that time she was prescribed compozine, a drug which is given for exposure to toxics or radiation which can have serious adverse effects for some time, including EKG changes and PDB recommends an evaluation in about three months before re-exposing the patient to such drugs. Not one of the doctors or nurses claim to know of her illness in that hospital three months earlier other than Dr. Hooper who made a reference to it on the chart which was ignored by the following doctors and nurses as well as his diagnosis and recommendations, prior to the time they came into the picture. The Peti-

tioner testified that she too had informed them of her history as she did so inform Dr. Hooper. Some of the history was noted on the chart by Nurse Clark and Dr. Hooper but the illness of 5/12/77 was ignored after Dr. Hooper. Dr. Schwartz wrote on the chart that she gave a history which was consistent with a paranoid schizophrenia but he did not make notes of what she said. Dr. Quershi had chartered a history he took from her prior to Dr. Schwartz and charted no such thing. Nurse Ballif who was with the Petitioner the night she was labeled testified that "she was rational and coherent" TR 60 L-1 and at TR 98, Nurse Ballif verified such sounds (which Petitioner had mentioned kept her awake) since she has worked at the Alexandria Hospital. (See TR 60 L-1, TR 98, TR 504, 547-49, Vol. II).

Further, A Dr. Gwozdz, a cardiologist in the District of Columbia testified that on May 12, 1977, he responded to the patient's call by calling her back at home and prescribing compozine pills through her pharmacy and would be surprised if she was in the hospital. (See TR 465, Vol. II.) The Petitioner presented evidence that she was in the hospital on May 12, 1977, and was medicated there and she testified that she was given IV's and at least one shot and that she did not call Dr. Gwozdz at all on that date but gave his name to the hospital. (See record of May 12, 1977 Vol. I and her testimony at TR 479-80, Vol. II.) The District of Columbia doctors are not suppose to practice in Virginia but the Petitioner did not know this when she was in the hospital during either visit. Most importantly, it was revealed during the trial that one of the jurors knew Dr. Gwozdz and the trial Judge ignored the problem involved.

Petitioner disagrees significantly with the testimony of the defense witnesses and suggests that the record is replete with contradictions, inconsistencies, and evasions in the defendants' positions at trial. Petitioner respectfully requests this Court to review the trial record as to the surrounding circumstances of teh diagnoses, the evidence she presented, the reasons advanced by the defense for the diagnosis and Petitioner's position on the facts concerning the factual basis for the diagnosis, the results of subsequent psychiatric evaluations and testing that the "Peti-

tioner could not have been psychotic in August 1977, and particularly not paranoid schizophrenic" TR 389 Vol. II, "I saw no evidence of paranoid schizophrenic in the tests, and paranoid schizophrenic is a kind of disorder that would be revealed all though your life, even with therapy you would show the symptoms of paranoid schizophrenic." At TR 406-07 "but on the Rorshach test and some other tests you pick up – you get under the mask." Vol. II, Dr. Minnie Spielberg, psychologist. Dr. Spielberg testified at TR 386 "that the Petitioner was not a paranoid schizophrenic when she evaluated her in 1981." "that she does not plan to see her again" TR 394, and testified at TR 385-86 "that psychologist have the right to make diagnosis in Virginia, the District and Maryland now, and that that would include diagnoses of all mental illness." See Vol. II. The trial Judge ruled: "She may render the opinions ordinarily and routinely rendered by a clinical psychologist in the course of professional duties. And if that includes interpreting the results of a test she administers, she may do so."

Dr. Edward Sheridan, psychiatrist and professor at Georgetown testified that he examined Petitioner "on three occasions at about one hour and 15 minutes a session and that he thought that psychological testing to be an important part of the differential diagnostic process" and at TR 235 Vol. II, Dr. Sheridan testified that his diagnosis was "a final diagnosis and she has anxiety and depression, mild depression, not psychotic depression, not even neurotic but situational is how I gauged it." Dr. Sheridan testified that she did not have a formal mental diagnosis but further elaborated at TR 172 (Vol. II) that his diagnosis was "obsessive personality with depression features. *No psychosis,"* and at TR 184 (Vol. II) he explains that this "is a personality trait or configuration". At TR 217 (Vol. II) Dr. Sheridan testifies "that when it comes to diagnosing someone paranoid schizophrenic, he should certainly hope that psychological testing was being done in 1977" and at L-18 he states that he "used DSM2 until last year, and then changed to DSM3, and this is what they teach and practice." At TR 185 (Vol. II) Dr. Sheridan testified "She was deeply hurt, very pained by that – the diagnosis of paranoid schizophrenic."

At TR 186 Dr. Sheridan testified "She was very open to full evaluation – often if someone is really paranoid schizophrenic, the last thing they want to do is open up their inner life to another human being; at TR 194 "that she was willing to provide all sorts of documentation if I thought it helpful..." and at TR 207 "... What I'm saying is that I do not have precise receipt date of different documents, but I remember seeing consultation summary before the deposition. (Vol. II). After counsel had Dr. Sheridan review the nurses' notes at trial and read the most damaging (and terribly mis-quoted and mis-stated explained under comments by nurses in this report). Dr. Sheridan testified that on the basis of the data that I'm aware recorded on paper and representations from her and psychological testing I would have to say that I think the doctor went beyond the data recorded in terms of making that diagnosis."

At TR 246 (Vol. II) Dr. Sheridan testifies "I think that's the crucial question is the total situation she was in at the time, and I think it's most important to realize what the person's up against and not just say that they're showing their weakest link in their chain of mental health, as it were, under that stress... so that I think we can over-diagnose." At TR 157 when asked "What mental effects on patients in Cardiac Care are relevant to attempting to make such a diagnosis in that setting?" Dr. Sheridan testified, "The anxiety of having to be worried that your heart may stop and terrified of annihilative anxiety can certainly hover in the mind of any of us in those situations in varying degrees... entitled to be very frightened... life-threatening situation.. doctors must be more concerned about the total situation... So, then if any medication is given, be it sedative, be it for any reason at all, this can change our sense of active control, organization of our usual thinking... all of the things physical, emotional and social..." Vol. II TR 157, 158, 159. The chart shows that valium, emergency medications for cardiac arrhythmias and other medication had been given prior to the time she was evaluated plus the fact that she had just stopped taking valium two or three days before the Cardiac Care incident. (See Petitioner's testimony at TR 486-492 Vol.

II.) There is too the compozine which had been prescribed three months earlier while she was in the same hospital and the warnings from sources noted at TR 547-59 (Vol. II) and in the statement read to the Review Panel in 1980.

Incredibly, in spite of the fact that the defendants took the position before the jury that they had made predictions, provisional and working impression diagnosis, as opposed to final diagnosis which both doctors had published (See Vols. I & II.) and communicated to others prior to trial, the Petitioner is left with "those things that flow" from the diagnosis, treatment plans, (Dr. Sheridan TR 122-23 Vol. II.) but cannot get health care for her cardiac problems, and the status of her physical condition, problems in obtaining health care in the cardiac area.

Dr. Molchon made an unqualified diagnosis of schizophrenia paranoid on his insurance form. The Physicians's Desk Book for 1977 and the AMA Drug Evaluation Book for 1977 also cautions as to the adverse effects of stelazine, another psychotropic drug which Dr. Molchon wanted her to take while she was in the Cardiac Care Unit. (See TR 547-549 LFB Vol. II.) Dr. Molchon wrote on his consult sheet that "pt reluctant to take psychotropic meds, *extremely* paranoid but testified at TR 887 L-4 Vol. II "She did not flatly refuse it, but stated that she did not want to take medication, but would talk to her doctor and consider it." At TR 920 at trial he admits she was not delusional about refusing drug (Vol. I), Dr. Schwartz placed paranoid schizophrenic on the front page of the chart under final diagnosis without any other comments in space allowed other than his signature. At the trial Dr. Schwartz testified that he suggested that she stay in the hospital but at TR 804 (Vol. II) Dr. Schwartz testifies that he did not list anywhere on the chart that this discharge was against medical advice. At TR 307 (Vol. II) the Petitioner's husband testified that "Dr. Schwartz did not recommend that she should stay in the hospital or that her treatment was not completed" and goes on to say that "he does not know of any such indication by Dr. Schwartz to Petitioner, nor were there any indications that Dr. Schwartz released her

against his judgment." Mr. Benson also testified that she had told him on the 16th and also that she had told her friend Mrs. Krance (deceased) who came to see her in the hospital on the 16th, that Dr. Schwartz said she could go home in the morning. TR 503 LFB; JLB TR 262-264 Vol. II. At TR 504, she testified that she had a very bad night and that "something kept her awake, it was like a generator type sound, maybe an air conditioning generator that went off and on spasmodically." See Nurse Ballif's testimony at TR 98 where she "verified such sound since she has worked at the Alexandria Hospital". The Petitioner testified that she called Dr. Schwartz's answering service and she asked that since he had promised to release her in the morning, she would appreciate it if he could drop by as early as convenient and then she proceeded to call her husband and related that to him, told him she had a headache and asked him if he could come in a little bit earlier to be with her. See JLB at TR 263 where he verifies this and that she did not say anything unusual or bizarre or irrational. At TR 306 JLB testified that he was in her room when Dr. Schwartz arrived, and verified that Dr. Schwartz said that the visit by Dr. Molchon would not be made a part of her record. Vols. I & II. One of the nurses gave her husband a note, on evening of the 16th, to call Dr. Schwartz and he was able to reach him by phone after she was home from the hospital. See JLB 299, 335, 344, Vol. II. She was discharged early on the 17th. At TR 335, JLB testified that he told her about the mental diagnosis soon after she learned about it from Medical Records. After she found out and contacted Dr. Schwartz by phone, he said to her over the phone, "You are a schizophrenic."

At TR 784 Vo. II Dr. Schwartz admits that her husband was in her room when he arrived that morning *and after her husband's testimony in his presence Dr. Schwartz testified "I suggested that she stay in the hospital... I wouldn't characterize it as a conversation in the sense that there were two parties. I spoke to him. He did not reply to me. And I did that when she went into the bathroom to get some of her things."* In addition to her husband's testimony Dr. Schwartz testified that *"she was indeed packed..."* not to mention the *change of story about the conver-*

sation with her husband having taken place in the "hallway" which he represented in his Statement of Fact to the Panel in 1980. *"..He spoke with her husband in the hallway,* advising *him that he felt that his wife needed attention for her psychosis and the husband agreed to take his wife back to see Dr. Kennedy upon (pg. 21 of Petition) discharge."* Also in his argument to the Panel in 1980 Dr. Schwartz represented ...that he "advised Dr. Kennedy of his findings and recommended that she be followed". (TR 780, Vol. II)

See Dr. Roark's testimony at trial where he admitted that Dr. Schwartz spoke with him "on the parking lot" on August 18, 1977, and told him "she was a paranoid schizophrenic". The Petitioner mentioned an invasion of privacy in her Amended Motion for Judgment. Dr. Roark refers to her as an x-patient in his 1980 deposition for the Panel (Vol. II TR 607, 480). She explained this in her letter to the Panel dated January 20, 1980 but the jury did not have access to documents.

At TR 804, Dr. Schwartz testifies that he did not list anywhere on the chart that this discharge was against medical advice. He indicated that he stated this in his discharge summary which he signed six months later, in Feb. 1978, when the records were finally released after her Dec. 5, 1977 letter of complaint to the State Board of Medicine. LFB 513-15 Vol. II. Dr. Schwartz did not see the Petitioner again. He testified, at trial, he believes that according to AMA standards, a person should show symptoms for six months before being labeled. TR 791, 974, Vol. II. At TR 558 Vol. II she was asked a question by Dr. Schwartz's counsel at trial about the "President getting the message" and was quite surprised because the word "Pres" was not on the chart. The chart used at the trial had the word Pres. thrown in the nurses notes above the PCS and one furnished under subpoena, has PCS for people's consumer.

At TR 883 Vol. II when asked just what the diagnosis was, was it a firm diagnosis, an impression... Dr. Molchon testified "Another term for it might be a provisional diagnosis, a working diagnosis... If as you continue to treat the patient, the

predictions that you made concerning the diagnosis do not come true... you change the diagnosis as you go along... It is sort of like a working hypothesis which is tested." At TR 882 Vol. II he testified "...you probably can get more accurate information by examining him at the time in which they are under the most stress – that is, at the time they are in the cardiac care unit... because if you move them to another place they may react entirely different and the next day ...you may not get any of this..." Dr. M lchon adds "...and even if that were not a satisfactory place to do an interview, I would have had to do it there, because that was the only place available." See Petitioner's testimony at TR 539-540; TR 504-508; TR 509-511, Vol. II). The Petitioner was only seen by Dr. Molchon once for a few minutes in CCU after being awaken late at night. She had never been told to see a psychiatrist.

In addition, the jury was left with what Dr. Molchon described as his *in juxtaposition interpretations of not* what *Petitioner said* or *wrote* but of *his interpretations* of *what she meant* after reading her letters to the review committees and evaluating her from his erroneous interpretations... Dr. Sheridan testified "...go into details and try not to stop at some sense of conclusion about what they said, but try to see how they come to that". At TR 914 Vol. II Dr. Molchon again throws in the word rays in his "in juxtaposition" of what he had just read in the record from one of her confidential letters to ethical committees in 1978 in efforts to resolve the matter administratively: "Her reference to modern technology in the context of drugs and rays." When asked on cross "again in that letter, Dr., I believe you made reference to something strange about modern technology in the context of drugs and rays and does anything in that letter make reference to rays." At TR 928 Dr. Molchon "..that the analysis of the letter was not based upon any specific statement being true or untrue, but the juxtaposition of statements..." The above-described is very important because the word rays was not mentioned by the Petitioner verbally and it does not appear in any letter. The word rays only appears once during the hospital visit and it is on Dr. Molchon's consult

sheet included in Vol. I and he finally admitted at the trial that she told him she was burned and that these *"burns were due to chemicals"*. At TR 870-71 Dr. Molchon testified "But she then started to talk about burns which she had had previously, and that these burns were due to chemicals. Again I couldn't pin her down as to who might be doing the chemicals, putting the chemicals there." However at TR 877 "..But in this case it was well formed in the sense that she was able to pull all her suspicions together and unify them as some sort of organized plot either from the CIA, and further organize them in the sense that all these things were happening to her as an attempt to control her mind." The Petitioner denied Dr. Molchon's interpretations and explains in her testimony TR 559-563 Vol. II that they were not aware of the revelations made in the publications mentioned, and that they moved out of the LaSalle in Sept., 1977 and the book "Spooks" was not published before 1978. Information from Spooks describing the LaSalle Building was admitted for identification at TR 327 by the opposition but in the end Defendant's Ex. E was a different item. See Vol. II Tr 913, 924-25,926 where Dr. Molchon reads another letter "the issue of frightening feedback, I think, would indicate to me that she is still concerned about experimentation – taken in context and in juxtaposition..." At TR 956-58 Petitioner "...She was coerced into psychiatry, given all sorts of drugs, including the drug Dr. Molchon wanted me to take and she later dies.." Dr. Molchon testified he was not familiar with Francis Farmer and admitted at TR 926 that "frightening feedback" could be the results of what happened to Francis Farmer. Vol. II.

Dr. Molchon called two nurses to testify in his behalf on the final day. Nurse Clark who admitted Petitioner to CCU left off her history of having been in that hospital 3 months earlier for chest pain, dehydration, fever and gastro problems in making notes and the medications she had been given in May. Although two doctors had seen her just before Clark did, Drs. Hooper and Quershi, and had not recommended a psychiatrist or anything mental, after she had been on medication, Nurse Clark recommended a psychiatric consult and went on vacation. She failed to write on the chart that Petitioner had been burned –

that she felt it was from verifiable chemical odors but did not know the cause. (Nurses failed to listen to what she was saying.) TR 629 Vol. II)

Nurses Clark and Hollingshead testified at the trial four years later to such things as rays and mind control which they had not written on the chart. However, Nurse Clark could not remember at the trial that Petitioner had asked her to go to a Congressional committee in behalf of the other people in the LaSalle if she died. See Petitioner's testimony at TR 486, 954-955, and 960, where she testified that Nurse Clark said something about her job, and she said she could not go to a Congressional Committee. Note where Dr. Hooper had just diagnosed a Prob. I.M.I. and to R/O intest. prob.; R/O (another heart condition) IHSS before she admitted Petitioner from ER to CCU and that the EKG showed a junctional rhythm and shifting pacemaker *not present* on May 12, 1977. (See Vols. I, II.) Nurse Hollingshead testified that Petitioner worked for the government. By testimony and charts Petitioner showed that she never worked for the government. Nurse Hollingshead testified about rays and mind control when counsel for Dr. Molchon asked her (which she had not written on the chart four years earlier) but when her counsel asked her what she told her when she first saw her at TR 823 L-17-19, "To be honest, I can't remember, I mean, it was four years ago." TR 835 said she could not remember outside the chart and testified that if she had said "anything that was pertinent she would have put it down" and explained that they see all the patients and then write the notes. LFB TR 955-956-962, 628-29 Vol. II, Nurse Hollingshead Vol. I & II.

Nurse Dickerson at the trial, wrote over a page of harmful mis-statements which were read in the records by others (but Dr. Hooper's notes and diagnoses were ignored by everyone as was her illness at Alexandria Hospital three months earlier, except by Petitioner and her husband mentioned Dr. Hooper but the Judge did not allow her to continue and go into the diagnoses he made) and she was not allowed to rebut Nurse

Dickerson's notes. There were other problems with Nurse Dickerson's notes like the timing, etc. (Although there were other nurses, we do not recall seeing the person who was described at the trial.)

There were erasers on the chart orginally released and EKG samples pasted over part of the writing in the nurses' notes and the other tampering previously described ("Pres.') and used at trial. They failed to put Fr. Jest's name down when he came in to give her the sacraments of her church, nor did the PCS – consumer representative ever show up as Dickerson charted and Dr. Molchon testified to. (TR 550 LFB Vol. II.)

Nurse Ballif who was with the Petitioner the night she was labeled, testified "that she was rational and coherent" TR 60 L-1. (Vols. I & II) At TR 55, she testified, ". . .patient upset because Dr. Molchon visited so late" and she verified the time issue that she came on at 11:00 and that Dr. Molchon was with Petitioner. See L. Benson's testimony at TR 556 L-3. Vol. II

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. It is beyond dispute that the opinion of the Review Panel went to the ultimate fact in issue before the jury. Were Drs. Schwartz and Molchon negligent in diagnosing the Petitioner as a paranoid schizophrenic or conversely did they follow and comply with the normal standard of care. The Panel found that they did.

Debate has gone on for years and rages today about the bounds and limits on psychiatric testimony in Court cases. It is the position of your Petitioner that to permit the opinion of the Review Panel to be exposed to the jury is to remove the jury as the ultimate fact finder. It is simply too much to expect a jury to confine itself to the live evidence before them and documents. No amount or quality of instruction by the Court can insure that the jury will not be overwhelmed and overborne by the opinion of the Panel. The jury here had a difficult time reaching a

decision, surely it is not remiss to speculate that it was the opinion of the Panel which tipped the scales. No litigant should be forced to overcome such a hurdle to gain a jury verdict.

II. Should this Court find that it is permissible to submit the finding of a Medical Malpractice Review Panel to a jury considering the same issue, then Petitioner asserts that she has the right to directly confront the finding of the Panel. Further, Petitioner should have the right to describe the proceedings before the Panel to the jury, show the jury what by way of testimony and documents was submitted and demonstrate what, if any, bias and prejudice existed on such panel. All of this effectively was denied to the Petitioner. Had the jury seen the Petitioner's submittals to the Panel they would have noted that Dr. Meloni who was originally named by the Virginia Supreme Court to serve on the Panel had already submitted the report he got from Dr. Schwartz "she carries a firm diagnosis of well structured paranoid schizophrenia which has been confirmed by psychiatric consultation" plus other damaging and unfounded information. When the Petitioner objected and asked that a woman be included on the Panel she was again denied. (They did agree however to replace Meloni.)

See Vol. I for a copy of letter to Petitioner from Mr. Ballard, attorney at the time of meeting, stating that Judge Russell's office had asked that the parties and their counsel be present for a short while, that no hearing would be held, and that no evidence or oral testimony would be taken but after she arrived the Judge insisted that she be questioned although she arrived unprepared but denied her the right to ask a question to Dr. Molchon re the "authorization release" explained fully in this report.

At trial the Judge refused to allow her counsel to explore basis for informed consent re her authorization for release of her records to Group Hospitalization. TR 895 (Vol. II) Dr. Molchon "Now, usually on the Blue Cross form you like to get the patient's signature. However, if for some reason the patient was discharged before I got around to getting the signature, I routinely had my secretary call the business office to make sure

that the patient had signed a release of information allowing the insurance company records of this hospitalization. If that has been done, which it was in this case, I can then release information for her chart to go to Blue Cross/Blue Shield." At TR 656 (Vol. II) when asked if she had signed authorization "I don't think I did. As a matter of fact, I think Dr. Molchon filled it out and said my signature was not available." (The Petitioner was immediately admitted to the Emergency Room on Aug. 14, 1977 as the record verifies.)

Defendant's Ex. K (the Panel Decision) was of course admitted by the trial judge. When, however, counsel for Petitioner at the trial sought to admit the entire Panel file, the Judge refused. At TR 930-31 (Vol. II), Judge, Counsel for Dr. Schwartz and Petitioner's counsel felt the Panel file should be admitted. When Counsel for Dr. Molchon pointed out that the letter from Dr. Eden, (another psychiatrist who had evaluated her and furnished a letter with the results) was hearsay the Judge ruled not to admit her submittals or the file but counsel for Dr. Molchon had already admitted a letter Dr. Neil Kennedy had sent the Petitioner which was also hearsay because Dr. Kennedy was not at the trial.

Had the Petitioner been able to use the Panel file before the jury, material and critically relevant inconsistencies and discrepancies would have been revealed between the defendants' conduct at the hospital in August of 1977, their depositions for the Panel, and their testimony at trial. Furthermore, Petitioner was precluded by the trial Court to get before the jury her submittals and attachments to Review Panel.

This combined not only to deny the Petitioner a fair trial and her day in court but to give the finding of the Panel even greater significance.

It was a fair statement that the factual basis which the two doctors claimed for their diagnosis was rebutted in the Petitioner's materials submitted to the Panel. The Jury was not allowed to see her submittals to the Review Panel. The inherent unfairness of this procedure is apparent.

III. A number of errors objected to at trial and raised before the Virginia Supreme Court of Appeals combined to their totality to deprive the Petitioner of a fair trial. Additionally, it is respectfully asserted that these errors gave the opinion of the Review Panel a standing and appearance of legitimacy to which it was not entitled.

(a) The trial Judge granted a motion to dismiss the case as against Dr. Schwartz before the Petitioner had an opportunity to call an additional witness, Dr. Robert Meloni, who Judge and lawyers had agreed to call after their arguments. This witness' testimony bore directly on Dr. Schwartz's credibility and culpability and Dr. Molchon. Incredibly, after dismissing the case against Dr. Schwartz, the Court then refused to let Dr. Meloni appear as a witness for Petitioner. (TR 731 Vol II) At TR 796 Dr. Schwartz testified that he "may well have communicated" to Dr. Meloni that she carried a firm diagnosis of well structured paranoid schizophrenia which had been confirmed by psychiatric consultation. The Judge at TR 643 (Vol. II) told the Petitioner that that point would be covered with another witness when she was asked about information from Dr. Meloni and Dr. Meloni was the only witness left. At TR 669, (Vol. II) the Judge said it was for the jury to decide if Dr. Schwartz had made a final diagnosis but he dismissed him before they could decide and did not pose that question to the jury re Dr. Molchon, nor whether or no she was a P.S.

At TR 669 (Vol. II), Dr. Schwartz admitted four years later at the trial when asked if he was qualified to make a conclusive diagnosis of paranoid schizophrenia at L-24, he testified "No." He testifies as to making judgments, diagnoses, impression... regarding potential psychiatric conditions, the patients that I see for psychiatrists on psychiatric wards." TR 661. At TR 145 when asked in this case was there any kind of a final diagnosis reached by you, or by your consultant, Dr. Molchon, Dr. Schwartz testified, "No, we had a working diagnosis." (See pg. 9 of Petition) The Meloni letters and explanations were a part of Petitioner's letters and submittals to the Malpractice Panel

which the jury did not get to see, not to mention the doctors' submittals to the Panel, (their depositions for the Panel were not subjected to cross) all of which would have shown material discrepancies and inconsistencies in their testimonies.

(b) When it appeared that the jury was having difficulty reaching a verdict, in fact that they were deadlocked, it was error under the circumstances of this case to give the Allen charge. Again we come back to the admission of the Review Panel's decision and refusal to permit the Petitioner to directly confront it. Upon being admonished to return to their jury room and attempt to reach a verdict considering the fraudulent representations re non-present "practicing psych", it was that much easier for the jury to simply accept and substitute the opinion of the Panel for their own convictions. (The two cases were tried together and so closely intertwined that Petitioner feels the Judge granting the primary care doctor's Motion to strike was prejudicial to her case.) After Dr. Schwartz was dismissed he was called and testified in Dr. Molchon's behalf so instead of being the Defendant the jury thought he was, he became a witness for the other Defendant, Dr. Molchon! The two doctors did not have any experts but served as their own experts which is the most unobjective, biased evidence available. (See pgs. 3, 4, 9 & 11 of Petition.) Her lawyer did express his reluctance and exception to the Allen Charge.

(c) One of the members of the Review Panel, a Dr. Shepperd, was on several occasions before the jury referred to by counsel for the defendants as a *practicing psychiatrist in Virginia. This was simply not so he is a neurologist, was not present at trial,* and represented to the jury as a practicing psychiatrist in Virginia. Even the Judge was informed of this misrepresentation but the jury was not told. She sent the Judge a handwritten note on a steno pad through the Baliff that the doctor represented himself as a practicing neurologist. (Vol. I copy of note.)

At TR 1028 Vol. II, Counsel for Dr. Molchon told the jury, "Well, we did offer expert testimony, members of the jury. That

was the purpose, if you will, of introducing, as the law permits us to do, the Medical Malpractice Review Panel, which you heard Dr. Molchon read. You heard me ask about who was the psychiatrist on the panel, and he said George L. Sheppard, Jr., M.D. He is the one that said the evidence does not support a conclusion that either of the health care providers failed to comply with the appropriate standard of care. That is expert testimony to be sure." Counsel for Defendant also told the jury all about the Panel Decision in their favor, and misrepresentation about "Psychiatrist" at the beginning of the trial. (See Vol. II TR 34-35.) The jury should have been shown her submittals which the "practicing Psych who was familiar with the standard", and lawyers on the Panel who represent insurance companies had been furnished by the Petitioner. (Not one of the panelists were at the trial.) Her letters dated Jan. 20, 1980 and Oct. 7, 1980, plus all attachments to the Panel would have revealed to the Jury her written explanation of the problems with the electrical equipment in the building, the copies of pages from the book "Spooks" by Jim Hougan, statements by Dr. Jonas Robitscher, a psychiatrist-lawyer taken from the "Powers of Psychiatry" published in 1980 about so called methods of treatment in psychiatry, adverse effects of compozine and critical remarks he documented about APA and their record of investigating complaints. In fact the October 7, 1980 letter and attachments were not in the so-called complete Malpractice File which her counsel at the time picked up from the Virginia Supreme Court prior to trial. Dr. Schwartz testified about seeing this letter and specifically mentioned Dr. Robitscher's comment re compozine.

(d) Petitioner was also deprived of the opportunity to present evidence of medical condition subsequent to August of 1977, showing that she had in fact a heart condition. Releases had been signed for counsel for Dr. Schwartz to obtain all of her records from the doctors she had gone to both in physical and psychiatric area. Commencing on the day after she left the hospital many sensitive areas were noted around the walls of her chest with a split physiological second sound, a minimal twist of the major heart artery in Feb. 1978, lumps on the breast, mus-

cle, biopsy and collar recommended to wear around her neck in Feb. 1978, prominent septal depolarization of the cardiac system in summer of 1978, chronic bronchitis in 1979, a sliding hiatal hernia in 1980 following an endoscopic, a mitral valve prolaspe in 1980, revealed from the Echo and Scann and two or three murmurs were heard, and again in 1980, it was felt that she had an atrial septal defect because of the second split sound which was also heard the day after she was discharged from the hospital. (See Vol. II TR 542, TR 589-591; 581-82; 586; 569; 543; TR 544; TR 645-46; 595-602; 607-609; TR 603-606.)

At TR 637, counsel noted his exception when the Judge refused to let her comment on what she learned by going to the Dr. DeBakey heart specialist consultants for evaluation. See L. Benson's testimony at TR 547, Vol. II where she refers to a statement read to the Panel by her lawyer. Another prominent District of Columbia doctor who had reviewed the Houston records and also noted the Atrial Septal Defect-like some of the other doctors who were subpoenaed as fact doctors and who would have verified her physical problems, were released without her knowledge or consent. No doctor who treated her after the incident was called. Counsel for the opposition told the jury that she had a "fixation" in referring to problems in heart area. The hearsay letter from Dr. Kennedy which he entered reads that he treated her since 1974 and that she was in excellent health and that no heart or cardiac problems were found at Alexandria Hospital, and it is dated Sept. 1977, after he had been contacted by Dr. Schwartz and the physician who saw her on the day after she left the hospital. (A rheumatologist who saw her in November 1977, told her he was sending her for a blood test which turned out to be a DNA Binding. The nurse asked her if he had explained the test to her or if she had been seen by the other doctor in his office to which she answered "no" in both cases. The other name on his door was that of a psychiatrist who did not see her. The rheumatologist asked her if she did anything very well to which she answered she was a housewife, administrative secretary, bookkeeper. He responded "but I mean something important". The care she was offered

after the incident at Alexandria Hospital was to go back to the geneticist by the rheumatologist and two other doctors which she could not do because he did not do anything for her chest pain and he did not tell her anything about this. She thought of Dr. Kennedy (an X-doctor) as an internist but learned later that he is a hematologist-geneticist. (TR 603-606, Vol. II).

Dr. John Roark, another cardiologist who practices at Alexandria Hospital (unaware of the environment she was in) testifies at TR 354, "it is not unusual for people, my patients as well as other peoples' patients, when hospitalized, and particularly if they have to have monitoring and this sort of thing, to become quite emotionally distraught." Dr. Sheridan testified that we can all have paranoid reactions under stress and that this is seen very often in people with heart evaluations, with or without surgery." Dr. Gwozdz, another cardiologist testified that he was not qualified to get into interpersonal matters.

ARGUMENT

A recent bill was introduced in the Virginia House that identified numerous civil liberties abuses in the procedures by which Virginia courts commit persons to psychiatric hospitals. The Washington Post reported that according to one study by the state mental health department, one third of the approximately 6,000 persons involuntarily committed to institutions every year may be confined illegally – a situation the president of the American Civil Liberties Union has called "scandalous" and complained about inadequate evaluations. The bill was defeated because of cost and a new criterion proposed by the American Psychiatric Association that would allow commitments for persons found to be "likely to suffer substantial mental or emotional deterioration."

As stated in a publication in the University of Richmond Law review by Thomas J. Harlan, Jr., a defense lawyer, "It is inconceivable that any instruction from the trial court could have the effect of making such opinion only advisory to the members of a medical malpractice jury when the composition of the panel includes in its membership a circuit court judge, a person held in

high regard by jurors. Since a trial "ought to be held sacred," 57 Va. Const. art. I S.II, it would seem that the introduction of the panel's opinion would be unconstitutional because of the undue influence it is bound to exert over the jurors." See *II V Richmond L. Rev.* 51 (1976). The Panel decisions are in favor of the HCP's in 80-90% of cases.

A Motion the Petitioner filed pro se to disallow the opinion of the panel was never argued nor was a later Motion brought by counsel at trial to protect her constitutional rights. (Vol. I) No litigant should be forced to overcome such a hurdle to gain a jury verdict. In *Comiskey v. Arlen*, U.S.L.W. 2019 (N.Y. Sup. Ct. July 2, 1976). The court "believes that to anticipate anything less than a full and complete adoption by the jury of the panel's recommendation as to liability is unrealistic and strains credulity. To allow the panel's recommendation to be introduced into evidence would nullify plaintiff's constitutional right to a meaningful jury trial. That portion of the statute permitting introduction of the panel's recommendation at trial is unconstitutional" 62 *Id.* 2020.

Mr. Harlan for the Law Review reports further "the problem becomes even more complex when the panel holds a hearing where the rules of evidence do not apply 65 Va. Code Ann. § 8-916 iii (Cum Supp. 1976). It is understandable why the legislature would want to relax the rules of evidence, presumably because it does not want to make this a formal "trial". Should the panel's opinion be based on inadmissible evidence, it follows that the opinion itself would be inadmissible in the absence of these sanctioning statutes. Is this not changing the rules of evidence in a judicial proceeding?" Mr. Harlan writes that "The Illinois Supreme Court struck down the medical malpractice statute." "The court noted that the application of legal principles is inherently a function of the judiciary and since the state constitution vested judicial power exclusively in the courts, the power given to the nonjudicial members of the panel rendered the statute unconstitutional." 49 *Wright v. Central Dupage Hosp. Assn.*, 63 Ill. 2d 313, 347, N.E. 2d 736 (1976). The powers given to the nonjudicial members of the

panel under the Virginia statutes are virtually identical to the Illinois statute." The Pennsylvania Supreme Court struck down their medical malpractice statute.

Petitioner should have the right to describe fully the proceedings before the Panel to the jury, point out inconsistencies, inadequate representations, show the jury all of her submittals, demonstrate what, if any, bias and prejudice existed on such Panel without being rushed by the Judge. Mr. Harlan writes "the last criticism of allowing the opinion of the panel to be introduced into evidence is the potential abuse of the true value of the opinion by one of the parties. . ." Mr. Harlan ends the Law Review article by saying "At the present time, *the panel seems to be more than a 'screening panel.'* " Because of the far-reaching consequences of its opinion, coupled with the high cost of utilizing the panel, the effect may be to chill the ardor of those persons contemplating using it. The jointly sponsored medico-legal screening committee, now defunct, with some minor adaptations and perhaps partially funded by the state, has all of the attributes of the present malpractice review panel without its drawbacks. In short, this appears to be "stop-gap" legislation, drafted hastily and without properly considering the consequences that flow therefrom. As such, it is inversely proportional to the haste with which it was drafted and enacted. It is doubtful that it will serve the purposes and needs of the medical community, nor is it likely to serve the needs of the claimants who have been victims of negligence on the part of HCP's" (See Vol. I). The non-psych represented as a practicing psychiatrist in Virginia, who knew the standard ignored the evaluation of a real psychiatrist, Dr. Eden, as did Drs. Molchon and Schwartz and the lawyers on the panel who represent insurance companies.

Dr. Molchon testified that he had not taken in to consideration or seen any other psychiatric opinion or materials the petitioner presented to the Panel, nor had he taken into account the opinions of any other psychiatrist who evaluated her nor any of the psychological testing done, TR 930-31 Vol. II.

Third, in the response in writing to the Virginia Supreme Court, counsel wrote Supreme Court informed consent was not alleged in the pleadings, and that it was not an issue before the Panel or the Court in response to her Exception No. 10. Had the jury been shown her submittals they indeed would have seen that she did mention in her letters of Jan. 20 and Oct. 7, 1980 that Dr. Molchon noted that her signature was not available on his insurance form where he showed an unqualified schizophrenia paranoid with his signature at the bottom and that the Petitioner mentioned an invasion of privacy in her Amended Motion for judgments filed pro se and entered by Judge Grandier. As applied to Dr. Schwartz the "parking lot" conversation is mentioned in Amended Motion for Judgment and verified by Dr. Roark at trial and in the Petitioner's testimony as described. Vol. II TR 357-58, TR 607.

At TR 1028 Counsel for Dr. Molchon referred to the Washington Psychiatric Association, the complaint she made to them and Dr. Molchon's response with a positive inference for Dr. Molchon before the jury. She did not have a copy of the letter he wrote them or his explanation. Dr. Molchon testified at trial that "that issue was also brought up as part of the investigation for WPS" when questioned about not including her signature on an insurance form. The point is that WPS took Dr. Molchon's word for it and the fact is she never signed an authorization for release. The State Board and the Alexandria Medical Society also accepted the word of both doctors as opposed to that of a patient who they labeled in the Cardiac Care Unit as being paranoid schizophrenic and ignoring her history.

The Judge at TR 639, would not allow Petitioner to explain why there were four other psychiatrists in the picture and the dates she had seen them. She had signed relreases for Dr. Schwartz to obtain all of them which his counsel at trial admitted he had, and she offered and in fact tried to comment on why she saw four and their evaluations but she was denied by the Judge. The opposition did not subpoena any of them or try to use the information they had. The fact is they only subpoenaed

records from a doctor who did not have any because he never saw her.

The Petitioner's counsel noted his exception to deleting the Instruction on inconvenience (No. 15). At TR 966-67 Vol. II counsel for Dr. Molchon told the Judge "She testified. . .she went to those physicians, practically all 28 of them for chest pain." The Judge then said the instruction on inconvenience would be stricken. The Petitioner had to go to Houston for a heart evaluation to obtain tests that revealed the problem and in the mental area the psychological testing – which she took in 1981. Since he did not ask for testing, was the Petitioner not justified in trying to avoid this inconvenience. As for the 28 doctors for chest pain, she had testified about all the valid reasons to go to various doctors and the records were available which she tried to offer and explain in each case but she was denied. See pgs. 20-21 of this report. The Petitioner was telling the truth but she was labeled a p.s.!

CONCLUSION

The Petitioner's constitutional rights to life, liberty, privacy and the pursuit of happiness without the "things that flow" from this diagnosis as described by Dr. Sheridan, have been destroyed. She has been denied health care and life insurance. As circumstances now exist, her dreams of attending law school seem impossible. All of these deprivations are directly caused by the erroneous label and indeed can be considered cruel and unusual punishment. The financial burden suffered by Petitioner, not to mention the pain of carrying the label, cannot be measured. In addition, the prejudicial conduct of the trial Judge as examplified by the rushing of the trial, denied Petitioner a fair trial. The Court has imposed costs on Petitioner. Judge Wiley Wright who tried the case made prejudicial remarks prior to trial and ruled before looking at the Kraut letter referring to Anderson's comment although she tried to tell him of the letter.

(Vol. I.) He denied more time and implied he had talked with Anderson.

Respectfully submitted,

Louella F. Benson, *Pro se*
6432 Montrose Street
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(703) 256-7595

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition was delivered, this 1st day of April, 1983, to: Kenneth Curtis, Esq., Shevlin & Curtis, 1400 Wilson Boulevard, Arlington, Virginia, 22209; and, Norman F. Slenker, Esq., Slenker, Brandt, Jennings & Johnston, 1012 North Utah, Arlington, Virginia 22201.

Louella F. Benson, *Pro se*

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 17th day of December, 1982.

Louella F. Benson, Appellant,

against Record No. 820344
Circuit Court Nos. L-6446 and L-6447

Appellees.

Richard A. Schwartz, M.D., et al.,

From the Circuit Court of the City of Alexandria

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the court is of opinion there is no reversible error in the judgments complained of. Accordingly, the ocurt refuses the petition and supplemental petition for appeal. Code § 8.01-675.

A Copy,

Teste: Allen L. Lucy, Clerk

By: /s/_____
Deputy Clerk